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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 872

FORD MOTOR COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

STATEMENT DISCLOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

STATEMENT OPPOSING JURISDICTION

Appellee respectfully submits that the questions presented by the appellant's jurisdictional statement have been settled by the decisions of this court and are not substantial.

Nature of the Pennsylvania Franchise Tax on Foreign Corporations

The tax in question was imposed by the Act of May 16, 1935, P. L. 184 (72 Purd. Penna. Stat., Section 1871, Pocket

Part). This statute amended the Act of June 1, 1889, P. L. 420 (72 Purd. Penna. Stat., Section 1871, *et seq.*) by adding the following provision:

"(b) Every foreign corporation, joint-stock association, limited partnership, and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to and pay into the treasury of the Commonwealth annually, through the Department of Revenue, a *franchise tax* at the rate of five mills upon a taxable value to be determined in the following manner. The actual value of its whole capital stock of all kinds, including common, special, and preferred, shall be ascertained in the manner prescribed in the twentieth section of this act, and shall then be divided into three equal parts.

"(1) Of one third, such portion shall be *attributed to business carried on within the Commonwealth*, as shall be found by multiplying said third by a fraction, whose numerator is the value of the taxpayer's *tangible property* not actually and exclusively used in manufacturing, situated within the Commonwealth, and whose denominator is the value of all the taxpayer's tangible property wherever situated.

"(2) Of another third, such portion shall be *attributed to business carried on within the Commonwealth*, as shall be found by multiplying said third by a fraction, whose numerator is the expenditures of the taxpayer for *wages, salaries, commissions*, or other compensation to its employees not exclusively engaged in manufacturing in this Commonwealth and assignable to this Commonwealth as hereinafter provided, and whose denominator is the total expenditures of the taxpayer for wages, salaries, commissions, or other compensation to all its employes.

"(3) Of the remaining third, such portion shall be *attributed to business carried on within the Common-*

wealth, as shall be found by multiplying said third by a fraction, whose numerator is the amount of the taxpayer's *gross receipts* from business not strictly incident or appurtenant to manufacturing in this Commonwealth assignable to this Commonwealth as hereinafter provided, and whose denominator is the amount of the taxpayer's gross receipts from all its business.

"The sum of the amounts, determined in accordance with the foregoing three rules, shall be the *taxable value*. * * *" (Italics ours.)

The final tax assessment, approved by the Supreme Court of Pennsylvania, was calculated as follows:

$$\frac{7,196,685}{301,110,025} \times \tfrac{1}{3} \text{ of } 498,428,150 = \$\ 3,970,896.$$

$$\frac{4,625,125}{167,346,984} \times \tfrac{1}{3} \text{ of } 498,428,150 = \quad 4,591,481.$$

$$\frac{45,927,254}{835,626,384} \times \tfrac{1}{3} \text{ of } 498,428,150 = \quad 9,131,447.$$

Taxable Value $17,694,184.

Tax at .005 $88,470.92

(260a)

Nature of Appellant's Business

The Ford Motor Company, a Delaware corporation, received on August 28, 1933, a Certificate of Authority under the Business Corporation Law of May 5, 1933, P. L. 364, 15 P. S. Section 2852, which authorized it "to transact in the Commonwealth of Pennsylvania the business of manu-

facture and sale of automobiles and parts thereof" (Deft. Ex. No. 3, 204a).

The Ford Motor Company, 1935, owned and operated a so-called "assembling" plant at Chester, Pennsylvania, at which an average of 3100 persons were employed (44a, 65a), and also two sales and service stations at Chester and Pittsburgh, respectively (44a). The company also owned a building in Philadelphia at Broad and Lehigh Avenues, which was used for the storage of parts and as a display and showroom for automobiles and trucks (60a). The Philadelphia building had previously been used as an assembly plant, before the assembly plant was moved to Chester (60a).

At the building in Pittsburgh, approximately 100 persons were employed. It was used as a service department and for the storage of parts which were sold to dealers (69a).

The Ford Motor Company also owns a company at Glassmere, Pennsylvania, which had been devoted to the manufacture of glass, but no business was carried on there in 1935, or since (51a).

The moneys received from sales of cars at the Chester branch or at Pittsburgh were regularly deposited in bank and credited to what is known as a "Treasurer's Account," which was subject to control only by the executives of the company at Dearborn, Michigan, and was disbursed by checks or orders from the latter (45a). In connection with each branch there was a bank account which was known as the "Branch Managers' Working Funds." This account was supplied by funds sent from Dearborn, was subject to the disposition of the branch manager, and was used to pay current expenditures of the branch, such as wages, supplies, etc. (46a).

The Ford Motor Company also had in Pennsylvania, bank accounts which were known as "dormant bank accounts," which were placed there by the executive officers at Dearborn and were subject to their control. These dormant accounts were used for the deposit of cash not immediately needed (47a). In addition, the Ford Motor Company also had an executive account in the Union Trust Company of Pittsburgh (47a).

With the exception of the branch manager's working accounts, all of these accounts were subject only to the control of the executives in Dearborn (47a, 259a).

The net book value of the tangible property of the company in Pennsylvania was $7,196,685.75. In Pennsylvania the wages paid were $4,625,125.48 and the receipts from business were $45,927,254.89 (260a). The average amount of cash on deposit in Pennsylvania banks during 1935 was $28,357,955.53.

The contentions in appellant's statement as to jurisdiction, will be considered in their order.

(a)

The Pennsylvania Franchise Tax imposed by the Act of 1935 is a tax upon the privilege of doing business in that State and not a tax upon property.

The nature of the tax was defined by the opinion of the Supreme Court of Pennsylvania in this case as follows:

> "• • • This Act imposes a *franchise* or *excise* tax upon foreign corporations, as distinguished from a property or ad valorem tax. • • • (Opinion, p. 3).

Previously the same court had definitely announced the same conclusion in *Commonwealth* v. *Columbia Gas*

and Electric Corporation, 336 Pa. 209 (1939), where it said:

> "Did the legislature intend to change its old policy of levying a property tax and create in its stead a franchise tax upon foreign corporations? We concur with the court below in its conclusion that the tax is a franchise tax and not a property tax. * * * (217) The incidence of a franchise or privilege tax is upon a franchise or privilege and not upon property or capital. * * * (218)
>
> * * * * * * *
>
> "* * * These fractions, as stated above, concern corporate activity. While they bear some relation to capital stock value, intrinsically they determine the taxable value of the corporate activity within this State rather than of the property located here. That it is the value of the franchise rather than the actual value of the property which is taken into account is clear from the factors which enter into the apportionment. * * * It does not ascertain physical worth of assets located in this State, but arrives at a value which the functional or operating organic unit within this State possesses. It represents what the right to do business is worth. It must follow that the tax is not levied on property but on the franchise to do business measured by a taxable value secured through the application of the factors of gross receipts, tangibles and payrolls to the capital stock value. It is representative of the value of that very franchise." (221-222)

Appellant argues that if a tax is measured by property according to its appraised value, it is a tax upon property. This contention overlooks the fact that the Pennsylvania franchise tax is based upon *three fractions:* not merely upon the proportion of tangible assets in Pennsylvania, but upon the proportion of wages paid and gross receipts obtained in this state. The second and third of these fractions have nothing to do with property. The first fraction

may show the proportion of tangible property employed in Pennsylvania, but the second and third fractions do not.

As the Supreme Court of Pennsylvania has said in the passage above quoted, the application of the three fractions "determine the taxable value of the corporate activity within this State rather than of the property located here." (221)

The wages fraction clearly measures activity. The receipts fraction also measures activity by considering the amount of business done and the amount of money which the corporation captures and removes from this State. If the appraised value of property employed in Pennsylvania were the sole measure, one-sided results would be obtained. For example, if a foreign corporation had its manufacturing plant, shipping facilities and inventory entirely in Pennsylvania, then it would have to be taxed on substantially its entire assets, although its sales were made entirely in Ohio or some other state. Vice versa, if the manufacturing plant and inventory were located in Ohio but the corporation sold all its products in Pennsylvania and had only salesmen operating in Pennsylvania, the tax to be collected by Pennsylvania would be negligible. The tax to be collected by Pennsylvania could not be influenced by the sales activities and large receipts obtained in this State. This, of course, applies especially to the Quaker Oats appeal.

As the Supreme Court of Pennsylvania said in *Commonwealth* v. *Columbia Gas and Electric Corporation,* 336 Pa. 209, at page 221, the use of three fractions is an attempt to make the measure more representative of the actual worth of the franchise to do business and to average out any hardship which might arise by reliance upon any single

one of the fractions. All this is wholly inconsistent with the contention that the tax is a tax upon property.

While the three fractions are applied to the value of the capital stock, two of these fractions do not depend at all upon property or the amount thereof.

An examination of the Pennsylvania formula and its three fractions as they appear above on page 3 will demonstrate that a tax is not imposed according to a valuation of property.

Furthermore, the tax base is obtained by multiplying two factors. The multiplier is the average of the three fractions or percentages. The multiplicand is the value of the capital stock. The multiplier is just as important as the multiplicand in determining whether the tax is a tax upon property.

While the multiplicand is the value of the capital stock, the multiplier—the average of the three fractions—does not represent value at all. When a figure representing value of the capital stock or property is multiplied by another figure which does not represent value, the product is not the value of property. Multiplying the value of the capital stock by proportion of wages and gross receipts cannot produce a figure which represents the value of *property*. The product is a composite figure and represents the value of the privilege of doing business in Pennsylvania.

On page 14 of appellant's statement of jurisdiction a distinction is attempted to be made between a tax measured by property according to valuation and a tax measured by property not requiring a valuation. The decisions cited do not reach the full length of appellant's contention.

In *Ford Motor Company* v. *Beauchamp*, 308 U. S. 331 (1940), this court sustained a tax under a Texas statute

which imposed a franchise tax based upon the proportion of outstanding capital stock, surplus and undivided profits which the gross receipts from business done in Texas bore to total gross receipts.

Mention may also be made of an earlier decision in *Society for Savings* v. *Coite*, 73 U. S. (6 Wall.) 590 (1867), which sustained a tax upon deposits of a savings bank although part of such deposits were invested in securities of the United States. Speaking of a tax measured by the amount of business done, this court said:

> "Experience shows that the latter mode is better calculated to effect justice among the corporations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted, and to the extent of their exercise. • • •" (608)

In this *Ford Motor Company* case property, although valued, played very little part in the computation of the tax base. In the numerators of the three fractions property in Pennsylvania amounted to only $7,196,685 out of $301,110,025, wages paid in Pennsylvania amounted to $4,625,125, gross receipts in Pennsylvania amounted to $45,927,254. The tax base was determined almost entirely by activity and business done, and not by property owned, in Pennsylvania. It seems absurd, therefore, to call the franchise tax a tax on property rather than a tax on a franchise or a privilege.

The decisions in *Arrott's Estate*, 322 Pa. 367 (1936), and *Commonwealth* v. *Union Trust Company of Pittsburgh*, 345 Pa. 298 (1942), do not conflict with our contention.

In Arrott's Estate, decided before *Commonwealth* v. *Columbia Gas and Electric Corporation*, 336 Pa. 209 (1939),

the question involved was defined by Chief Justice Kephart as follows:

> "The question to be determined is whether resident owners of stock of foreign corporations subject to the Franchise Tax Act are required to pay the four mill personal property tax imposed by the Four Mill County Act. The question is precipitated by the substitution of a franchise tax on foreign corporations for the privilege of doing business in this State for the capital stock tax heretofore exacted by the capital Stock Tax Act. * * *" (369)

After the decision in the *Columbia Gas and Electric* case, the *Arrott* case was reconsidered in *Commonwealth* v. *Union Trust Company of Pittsburgh*, 345 Pa. 298 (1942). The Supreme Court said:

> "* * * While in Commonwealth v. Columbia Gas & Electric Corp., 336 Pa. 209, 8 A. (2d) 404, it was pointed out that the tax under the Act of 1935 is not a capital stock tax, being levied on a franchise or privilege and not on property or capital of the corporation, that case did not impair the ruling in Arrott's Estate, 322 Pa. 367, 185 A. 697, that there was such a close identity between the capital stock tax and the franchise tax that the owners of shares of stock in foreign corporations which paid the franchise tax were not obliged to pay a personal property tax on such shares, it being the general policy of the State to avoid double taxation. * * *" (307)

We have quoted at some length from the Pennsylvania statute and the opinions of the Supreme Court, because of the inconsistent assertions of the appellant that the Pennsylvania Franchise tax is a tax upon *property*. In particular, appellant's points (b) to (d) are based on the assumption that the tax is upon property.

The Supreme Court of Pennsylvania characterized appellant's argument as a "studied confusion of the essential

differences between a *property* tax and a *franchise* tax" (p. 13).

(b)

The method of allocation provided in the Act of 1935 is not arbitrary or unreasonable.

In *Butler Bros.* v. *McColgan*, 315 U. S. 501 (1942), the statute imposed a tax upon net income derived from business done within the State to be "determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value and *situs of tangible property.*" The percentage used in the assessment "was determined by averaging the percentages which (a) value of real and tangibles personal property, (b) wages, salaries, commissions and other compensation of employees, and (c) gross sales, less returns and allowances, attributable to the San Francisco house bore to the corresponding items of all houses of appellant." (505)

In the opinion, Mr. Justice Douglas said:

> "We cannot say that property, pay roll, and sales are inappropriate ingredients of an apportionment formula. We agree with the Supreme Court of California that these factors may properly be deemed to reflect 'the relative contribution of the activities in the various states to the production of the total unitary income,' so as to allocate to California its just proportion of the profits earned by appellant from this unitary business. * * *" (509)

The statement in paragraph 3 at the end of appellant's point (b), that under the California statute involved in the *Butler Brothers* case the income from intangibles was "specifically allocated according to situs of intangibles", seems to us to be without foundation.

The ruling in the *Butler Brothers* case, we submit, covers the case at bar, unless there is merit in the distinction advanced by appellant, that in the *Butler Brothers* case the tax was imposed upon income, and not upon capital stock.

In reply to this distinction we submit:

(1) Appellant has offered no proof that the application of the Pennsylvania formula would be arbitrary or unreasonable because a portion of the capital stock rather than a portion of the net income was the tax base. "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed." (*Butler Bros.* v. *McColgan*, 315 U. S. 501, 507).

(2) Appellant's contention is ultimately based upon the same assumption that the Pennsylvania tax is a tax upon property.

(3) Appellant incorrectly states that "capital stock representing property and assets value is selected as the basis of the tax". The tax base is not capital stock as such but a composite figure obtained by multiplying the value of the capital stock by fractions representing the proportion of wages paid and gross receipts obtained, as well as of tangible property in the State. This figure represents the value of the privilege of doing business in Pennsylvania.

(4) The State makes no presumption, such as appellant implied, "that capital or property is employed in the same ratio as business activities." The purpose of the Pennsylvania statute in employing the wages fraction and the gross receipts fraction in the formula, is to measure business activity to an extent that property might not measure it, in order to obtain a fairer valuation of the privilege or franchise to be taxed.

Furthermore, in *Ford Motor Company* v. *Beauchamp*, 308 U. S. 331, this court sustained a franchise tax based upon capital stock rather than on income. The tax statute there considered imposed "a franchise tax * * * based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures * * * as the gross receipts from its business done in Texas bears to the total gross receipts * * *." (333)

In *Ford Motor Company* v. *Oklahoma Tax Commission*, 188 Okla. 78, 106 Pac. (2d) 803 (1940), an assessment was upheld which was made under an Oklahoma statute which imposed a franchise tax upon the proportion of the *capital stock* which *property* owned and *business* done in Oklahoma bore to total property owned and business done.

Appellant also relies much upon the ruling in *People ex. rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N. Y. 48, 129 N. E. 202 (1920), certiorari denied 256 U. S. 702.

In this case three judges concurred in the opinion, one judge concurred in the result and three judges dissented in this case. The statute in this case imposed a tax upon the proportion of income determined by the ratio of specified assets within the state to the aggregate of such assets everywhere. Bonds were not included in these assets, but the interest from the bonds was included in the income taxed. This decision, we submit, is directly contrary to the ruling of this court in *Butler Bros.* v. *McColgan*, 315 U. S. 501.

This court has frequently held that it is no objection that the measure of taxation is found in income produced, in part, from property, which in itself, is nontaxable, or from the receipts from interstate commerce which may not be taxed as such: (See *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 165; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 389.)

(c)

Neither the Franchise Tax Act of 1935 nor the method of allocation used in this case imposes a tax upon property located outside of Pennsylvania.

As already shown, the Supreme Court of Pennsylvania has held that the Act of 1935 does not impose a tax upon property whose situs is beyond the limits of the State.

Thus in *Commonwealth* v. *Columbia Gas and Electric Corporation,* 336 Pa. 209 (1939), Chief Justice Kephart said:

> "• • • These fractions, as stated above, concern corporate activity. While they bear some relation to capital stock value, intrinsically they determine the taxable value of the corporate activity within this State rather than of the property located here. • • • It does not ascertain physical worth of assets located in this State, but arrives at a value which the functional or operating organic unit within this State possesses. It represents what the right to do business is worth. It must follow that the tax is not levied on property but on the franchise to do business measured by a taxable value secured through the application of the factors of gross receipts, tangibles and payrolls to the capital stock value. It is representative of the value of that very franchise." (221-222)

This court has frequently held that while a state may not tax property beyond its borders, it may measure a tax by capital stock which, in part, represents property outside the state.

Thus in *Kansas City, Memphis & Birmingham Railway Company* v. *Stiles,* 242 U. S. 111 (1916), Mr. Justice Day said:

> "• • • while the state could not tax property beyond its borders, it might measure a tax within its

authority by capital stock which in part represented property without the taxing power of the state. * * *." (119)

In *Atlantic Refining Company* v. *Virginia*, 302 U. S. 22 (1937), Mr. Justice Brandeis said:

"* * * The value of the privilege acquired is obviously dependent upon the financial resources of the corporation. * * * Obviously, the power inherent in the possession of large financial resources is not dependent upon, or confined to, the place where the assets are located. Compare Great Atlantic & P. Tea Co. v. Grosjean, 301, U. S. 412, 81 L. Ed. 1193, 57 S. Ct. 735, 112 A. L. R. 293. Great power may be exerted by the company in Virginia although it has little property located there. * * *"

In *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331 (1940), Mr. Justice Reed said:

"In a unitary enterprise, property outside the state, when correlated in use with property within the state, necessarily affects the worth of the privilege within the state. Financial power inherent in the possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine. For this reason it is held that an entrance fee may be properly measured by capital wherever located. The weight, in determining the value of the intrastate privilege, given the property beyond the state boundaries is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state. * * *." (336)

Other decisions to the same effect are:

Great Atlantic & Pacific Tea Company v. *Grosjean*, 301 U. S. 412, 424-425 (1937);

Underwood Typewriter Co. v. *Chamberlain,* 254 U. S. 113 (1920);

Bass, Ratcliff and Gretton v. *State Tax Commission,* 266 U. S. 271, 282 (1924).

Counsel for appellant repeatedly argues that the intangible assets included in the value of the capital stock have a business situs outside of Pennsylvania.

It is fundamental, however, that the business or commercial situs of intangible assets is irrelevant in applying the formula to determine the value of the franchise of a foreign corporation to do business in the taxing state.

The question as to the intangibles is not, where is their business situs, but whether they contribute to the activity carried on in the taxing state.

In *Ford Motor Co.* v. *Clark,* 100 F. 2d 515 (1938), the same stocks and government securities, as are involved in this case, were held to be properly included in assessment of franchise tax.

Circuit Judge Sibley, for the Circuit Court of Appeals for the Fifth Circuit, said:

> "It is further argued that the United States bonds and stocks in foreign corporations owned by the taxpayer cannot reasonably be included in capital contributing to sales in Texas. The presumption is that all the property of a business corporation is useful in its business. It should not have it otherwise. The Ford Motor Company has no business except the making and selling of cars. *The securities can readily be used as a means of raising cash for working capital.* * * *" (518.) (Italics ours.)

This decision was affirmed by the Supreme Court under the title of *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331 (1940).

In *National Leather Co.* v. *Massachusetts,* 277 U. S. 413 (1928), Mr. Justice Sanford said:

> "For present purposes it may be assumed that the capital stocks of the two subsidiary companies had no situs in Massachusetts which brought them within the jurisdiction of that state for the purpose of imposing a direct property tax. * * * But here the statute does not impose any direct tax upon these stocks and, as construed by the Massachusetts court, merely treats them as assets employed by the petitioner in its business within the state, and therefore requires that they be included when the total assets so employed by it are computed for the purpose of arriving at the proportionate part of the value of its own capital shares—determined by comparing the assets employed in business within the state with the total assets wheresoever employed or located—on which the excise for the privilege of carrying on its business within the State is imposed." (422-423)

This last decision was cited with approval by Mr. Justice Reed in *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331, 335-336 (1940).

(d)

Appellant's analysis of Ford Motor Co. v. *Beauchamp,* 308 U. S. 331.

Appellant's analysis of this decision deals with accidents, and not the essentials of this case.

Appellant does not suggest how the particulars of the Texas statute as recited by it, affect the principles laid down by this Court in the *Beauchamp* case.

The tax in Texas, as well as in this State, was a franchise tax for the privilege of doing business in the State. The *principles* by which the *tax base* was determined in the *Beauchamp* case are applicable to the case at bar, regardless of the rate of the tax or the duration of the right to do business.

The *Beauchamp* case and the case at bar involve the same Ford Motor Company and substantially the same total assets and total earnings as well as the case at bar does. However, the tax base—the value of the franchise—in Texas, as approved by this Court in the *Beauchamp* case, was fixed at a higher rate than the tax base as determined in the case at bar.

The records show the following figures:

	Total Assets	Assets in State
Texas (1936)	$600,242,151	$3,079,417
Pennsylvania (1935)	681,549,728	7,196,685

	Total Receipts	Receipts in State
Texas (1936)	$888,344,975	$34,272,887
Pennsylvania (1935)	835,626,384	45,927,254

The taxable values of the capital stock, resulting from the application of the formulas of the two States, were as follows:

Texas, $23,157,705
Pennsylvania, $17,694,184

The ruling in the *Beauchamp* case is conclusive of the case at bar.

(e)

The Act of 1935 and the tax imposed on appellant thereunder do not deny to it the equal protection of the laws.

No discrimination has been shown in either the purpose or the effect of the Act of 1935.

The Legislature did not enact the statute for the purpose of discriminating against foreign corporations.

No one contends that they did.

On the contrary, the purpose was to remove the discrimination against domestic corporations, which had previously existed.

This purpose was recognized and expressed by the court in *Commonwealth* v. *Columbia Gas and Electric Corporation*, 336 Pa. 209 (1939). Referring to the capital stock tax law, that court said:

> "• • • Under this arrangement foreign corporations, transacting a large part of their business here, escaped their fair share of the tax burden. The assets of foreign corporations, so far as they were comprised of intangibles, were wholly free of tax notwithstanding that they have played an important part in the conduct of the company's local business. The old tax did not even reach all the tangible property of the enterprise located in this State. It made no attempt to value foreign corporations either as going concerns within this State, or as parts of going concerns which the foreign corporations had created through operations in this and other states. The discrimination under the old tax law was not only unfair, but operated unjustly in favor of foreign corporations and against domestic corporations, even though they might be similarly situated. • • •
>
> "The legislature sought to remedy this condition by amending the law so that foreign corporations would pay substantially the same amount of tax as domestic corporations though the amount of the tax was arrived at by a different method. The new tax is more in keeping with the benefits received from this State. The tax base represents the value of their right to do business in this State." (215-216)

That no discrimination was made, follows from principles well settled by the decisions of this court:

(1) A state may place a foreign corporation in a different class from domestic corporations for the purpose of

taxation, and impose a different rate of tax upon the foreign corporation for the privilege of doing business within its territorry:

Kansas City, Memphis, & Birmingham Railroad Company v. *Stiles*, 242 U. S. 111, 118 (1916);

Madden v. *Kentucky*, 309 U. S. 83, 87-88 (1940);

Concordia Fire Insurance Company v. *Illinois*, 292 U. S. 535, 547-548 (1934);

Kidd v. *Alabama*, 188 U. S. 730, 732 (1903);

Cheney Brothers Company v. *Massachusetts*, 246 U. S. 147, 157 (1918).

(2) The burden is on the party attacking the classification to negative every conceivable basis which might support it:

Madden v. *Kentucky*, 309 U. S. 84 (1940).

(3) Mathematical equivalence, or exact identity are not necessary:

Concordia Fire Insurance Company v. *Illinois*, 292 U. S. 535, 547-548 (1934).

(4) Only clear and hostile discriminations against particular persons or classes are prohibited:

Heisler v. *Thomas Colliery Co.*, 260 U. S. 245, 255 (1922);

Colgate v. *Harvey*, 296 U. S. 404, 436-437 (1935), overruled on other grounds in *Madden* v. *Kentucky*, 309 U. S. 83, 93 (1940).

(5) The absence of discrimination is conclusively shown by the fact that if appellant were incorporated under the laws of Pennsylvania, its tax to this Commonwealth would amount to more than *ten times the assessment made in this case.*

The court of Common Pleas affirmed the Commonwealth's twentieth request for a finding of fact, as follows:

"20. If the defendant had been a Pennsylvania corporation, its capital stock tax for the year 1935 would have been $874,624.28.

"Answer: Affirmed." (220a)

Appellant did not except to the court's answer to this request.

The computation of this capital stock tax is shown on Commonwealth's Exhibit No. 3 (163a), and was explained by the Commonwealth's witness, Charles L. Seligman, and Auditor for the Department of Revenue (156a-160a).

The actual assessment as recalculated in the judgment of the court below was $88,470.92 (260a).

In *Madden* v. *Kentucky*, 309 U. S. 83, 88 (1940), Mr. Justice Reed said:

> "* * * Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attaching the legislative arrangement to negative every conceivable basis which might support it."

(6) The cases of *Southern Railway Company* v. *Greene*, 216 U. S. 400 (1910) and *Hanover Fire Insurance Company* v. *Carr*, 272 U. S. 494 (1926), cited by the appellant, are clearly distinguishable in the case at bar, because—

(a) In each of these cases the tax imposed upon the foreign corporation amounted to a *clear discrimination*. In the *Southern Railway Company* case domestic and foreign corporations had been subject to a franchise tax at the same rate, and then the Legislature provided for an additional annual franchise tax by foreign corporations only. In the *Hanover Fire Insurance Company* case the

domestic insurance corporation paid a tax on the assessment of personal property at a valuation reduced to one-half of 60% of the value of the property, whereas the foreign insurance corporation was required to pay a tax at the rate but imposed upon 100% of its net receipts.

(b) In each case the foreign corporation had invested a large amount of money in property devoted to a limited and special use and not readily available for other uses. In the *Southern Railway Company* case the company had purchased and built and improved lines of railroad which connected with other lines owned by it. This case is distinguished in *Cheney Brothers Company* v. *Massachusetts*, 246 U. S. 147, 157 (1918), and in *Northwestern Mutual Life Insurance Company* v. *Wisconsin*, 247 U. S. 132, 140 (1918). In this last case this court said:

> "• • • In that case we laid stress upon the fact that the tax related to railroad property not susceptible of other uses, which, placed in the state, had to remain there permanently, and could not be withdrawn at the pleasure of its owners. Under such circumstances, and dealing with that character of property, we held that the particular tax constituted such discrimination as to deny to the company the equal protection of the laws. • • •" (140)

In the *Hanover Fire Insurance Company* case the company had done business in Illinois for a number of years and had built up a large business and good will and had many agents and extensive records there. In this last case, however, Chief Justice Taft said:

> "• • • We have said in Cheney Bros. Co. v. Massachusetts, 246 U. S. 147, 62 L. ed. 632, 38 Sup. Ct. Rep. 295, and in Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111, 118, 61 L. ed. 176, 187, 37 Sup. Ct. Rep. 58, that a state does not surrender or abridge its

power to change and revise its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits, and that a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the state grants them; * * *" (514-515)

In the *Cheney Bros. Co.* case, the fact that the foreign corporation had made a very substantial investment—$175,000—in lands and buildings for an auto service station and garage did not prevent the State of Massachusetts from increasing its annual license fee.

(f)

Neither the Act of 1905 nor the assessment of tax against the appellant thereunder impairs the obligation of contract.

Appellant contends that a contract was created between itself and the Commonwealth of Pennsylvania by Section 1010 of the Pennsylvania Business Corporation Law of May 5, 1933, P. L. 364, 15 P. S., Section 2852-1010, which provides as follows:

"A foreign business corporation which shall have received a certificate of authority under this act, *so long as such certificate of authority shall not be revoked or cancelled,* shall enjoy the *same rights and privileges as a domestic business corporation, but no more,* and, except as in this act otherwise provided, shall *be subject to the same liabilities, restrictions, duties* and penalties now in force or hereafter imposed upon domestic business corporations, to *the same extent as if it had been organized under this act* to transact the business set forth in its certificates of authority." (Italics ours)

Our position is that no impairment of the obligation of contract has resulted, because—

(1) *Section 1010, above quoted, even if it embodies a contract between the appellant and the Commonwealth, does not confer the same rights or impose the same liabilities on a foreign corporation in the matter of taxation:*

The peculiar wording of this section distinguishes it from analogous clauses which have been employed in statutes or constitutions of other states. What is peculiar is the language:

> "• • • *to the same extent as if it had been organized under this act to transact the business set forth in its certificate of authority.*" (Italics ours.)

These words, we submit, define what is meant by the "same rights and privileges" and the "same liabilities". The language means the rights and liabilities which would be conferred if the foreign corporation had been organized under this act, namely, the Business Corporation Code. It means the rights conferred and liabilities imposed by this elaborate Business Corporation Code itself.

The language does not mean every right or liability which might be created under any existing law of the Commonwealth.

This, we submit, is what Section 1010 means, and is all that it means. Section 1010 does not mean that the foreign corporation must be subject to the same identical liabilities as the domestic corporation in the matter of taxation, because the problem of the state in taxing a foreign corporation is very different from the problem of taxing a domestic corporation. This has been recognized in many decisions of the Supreme Court of this State and also by the Supreme Court of the United States, which hold that a state may place the domestic and foreign corporations in different classes for the purpose of taxation.

In *Commonwealth* v. *The American Gas Company*, 54 Dauph. 115 (1943), Judge Hargest of the Common Pleas of Dauphin County said:

> "The Business Corporation Law is a regulatory Act; it is not a taxing statute; and we are of opinion that the words 'liabilities, restrictions, duties and penalties' in that act have no reference to taxation." (152)

In the opinion of the Court of Common Pleas, in this case, Judge Hargest also said:

> "We do not understand that the Business Corporation Law deprives the State of its well-recognized power to differently classify foreign and domestic corporations for taxation, provided there is no arbitrary discrimination against one class or the other. • • •" (243a)

Section 1010 of the Business Corporation Code does not say that the rate of taxation shall not be changed or be identical with the rate charged to domestic corporations, but only that the foreign corporation shall enjoy the same rights and privileges as a domestic corporation.

Hence, so long as the foreign corporation does not pay higher taxes than does the domestic corporation, the foreign corporation had no ground for complaint.

If this interpretation is correct, there has been no impairment of the obligation of the alleged contract sought to be derived from Section 1010 and the record presents no Federal question of impairment of obligation of contract.

(2) ***The alleged contract would not be impaired because the tax liability of the appellant in this case is far less than it would have been if it had been organized under this Business Corporation Law of 1933.***

The contract right "to the same liabilities" as if appellant "had been organized under this act" would not be vio-

lated by the assessment made in this case, which was about one-tenth of the assessment that would have been made against the appellant if it had been organized under the Pennsylvania Code. See the calculations above under (5) of point (e) and pages 156a-160a and 220a of the printed record in the Supreme Court of Pennsylvania.

(3) *Section 1010 did not create a contract between the appellant and the Commonwealth.*

(a) *The certificate of authority issued to the appellant under Section 1010 conferred only a revocable license:*

Connecticut Mutual Life Insurance Company v. *Spratley*, 172 U. S. 602, 620 (1899);

Doyle v. *Continental Insurance Company*, 94 U. S. 535, 540-541 (1877);

Home Insurance Company of New York v. *Augusta, Georgia*, 93 U. S. 116, 120, 122 (1876);

Commonwealth ex Rel. Baldrige v. *Sun Oil Co.*, 294 Pa. 99, 105 (1928);

Rule v. *Price*, 323 Pa. 139, 143-144 (1936).

(b) *The right or license which appellant secured under Section 1010 was made expressly revocable.*

The right was to continue only "so long as the certificate of authority shall not be revoked or canceled."

Section 1010 states unqualifiedly that the certificate of authority is to continue only so long as it shall not be revoked or canceled.

The Commonwealth, which granted the license, has the sole power to "revoke" or "cancel" the license.

This provision is wholly inconsistent with the existence of a contract.

(c) *It is an elementary rule of the law of contracts that if one party reserves the right to cancel, the proposed agreement is void for lack of mutuality.*

Thus in *1 Williston on Contracts,* Section 105, page 365, the author states:

> "• • • As has been seen an agreement which the party reserves the right to cancel at his pleasure cannot create a contract."

In *Ellis* v. *Dodge Bros.,* 237 F. 860, 867 (1916), a contract by a manufacturer granted a license to a dealer to sell cars, but provided that the contract might be canceled by either party at any time upon fifteen days' notice.

The court held that the dealer's administrator could not recover at all on the contract, saying:

> "• • • Even if there were an agreement here on the part of the Dodge Bros. to deliver the cars, this right to cancel would seem to nullify any such agreement. To agree to do something and reserve the right to cancel the agreement at will is no agreement at all."

Other decisions to the same effect are:

Interstate Iron & Steel Co. v. *Northwestern Bridge & Iron Co.,* 278 F. 50 (1922);

Velie Motor Car Co. v. *Kopmeier Motor Car Co.,* 194 F. 324 (1912);

City of Pocatello v. *Fidelity & Deposit Co. of Maryland,* 267 F. 181 (9th C. C. A. 1920);

Williston on Contracts (Rev. ed.), Section 43, page 126.

Any right which appellant could obtain under Section 1010 would be revocable under the reserved power contained in the Pennsylania Constitution.

Section 1010 confers upon a foreign corporation—

> "• • • the same rights and privileges as a domestic business corporation, but no more • • •."

Therefore, if a domestic corporation could only secure a revocable right to do business in this State, the same must be true of a foreign corporation registering under Section 1010.

The license or right of a domestic corporation and therefore of a foreign corporation, was subject to the right of the General Assembly to alter, revoke or annul under Article XVI, Section 10 of the Pennsylvania Constitution.

Article XVI, Section 10 provides:

> "The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this Commonwealth, in such manner, however, that no injustice shall be done to the corporators. * * *"

The domestic corporation has only a revocable right to do business, and the foreign corporation is expressly given the same right, but no more.

Clearly the right of a foreign corporation to do business in this state is thereby made revocable at any time.

Again, the foreign corporation—

> "* * * shall be subject to the same liabilities, restrictions, duties, * * *" etc.

imposed upon domestic business corporations, to the same extent as if the foreign corporation had been organized under the Business Corporation Code.

The franchise of a domestic corporation is subject to the definite "restriction" that it may be revoked at any time by the Legislature. The foreign corporation is expressly made subject to the same restriction as a domestic corporation. To make the language more certain, Section 1010 expressly declares that the foreign corporation shall be

subject to the same restrictions, etc., "as if it had been organized under this act," as a domestic corporation.

As the contract right asserted by appellant may be revoked by the Legislature at any time, such right does not amount to a contract at all.

In *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322 (1909), (quoted in appellee's brief, page 80), the Arkansas constitution (Article 12, Section 111) authorized foreign corporations to do business in the state, subject to the same regulations and with the same rights as those enjoyed by domestic corporations.

Article 12, Section 16 of the same constitution contained a provision similar to Article XVI, Section 1010 of the Pennsylvania Constitution, authorizing the Legislature to repeal charters provided that "no injustice shall be done to incorporators."

The Supreme Court of the United States held that in view of this clause a foreign corporation obtained no contract right.

Mr. Justice White said:

> "* * * *The claim of an irrepealable contract cannot be predicated upon a contract which is repealable.* * * * (345-346) (Italics ours.)

The Legislature of Pennsylvania did not intend that a foreign corporation should have a better right and pay less taxes in proportion than a Pennsylvania corporation.

(d) *The reserved power to revoke may be exercised by any general law amending or changing Section 1010, and without first enacting a statute expressly revoking the license or charter.*

Hammond Packing Company v. *Arkansas,* 212 U. S. 322, 345-346 (1909);

Phillips Petroleum Co. v. *Jenkins,* 297 U. S. 629, 635 (1936);

Wagner Free Institute v. *Philadelphia*, 132 Pa. 612 (1890);

The Iron City Bank v. *The City of Pittsburgh*, 37 Pa. 340 (1860).

In *Town of Southington* v. *Southington Water Co.*, 80 Conn. 646, 69 Atl. 1023 (1908), the Supreme Court of Connecticut said:

> "* * * Amendments or alterations of charters may result from the operation of general laws, as well as from special legislation addressed to the corporation in question. * * *" (1026)

The courts have held that the mere passage of a later statute inconsistent with the charter is sufficient act of revocation, without any notice. The State need not first give some notice or form of revocation. The later tax or other statute need not refer to the charter at all.

(c) *The power of the Commonwealth to revoke a certificate or authority of a foreign corporation under the language of Section 1010—"so long as such certificate of authority shall not be revoked or cancelled"—is not limited or restricted by Section 1013 of the Business Corporation Code.*

Section 1013 provides:

> "Whenever the Department of State shall find that a foreign business corporation, authorized by a certificate of authority to do business in this Commonwealth, is engaged in this Commonwealth in any business which it is not authorized to transact by its certificate of authority or by any amended certificate of authority, or has changed its name or the location of its registered office without first securing an amended certificate of authority, as required by this act, or is violating any of the laws of this Commonwealth, the Department of State shall give notice by registered

mail to such corporation that such default exists and that its certificate of authority, including any amendments thereto, will be revoked and cancelled unless such default shall be cured within thirty days after the mailing of such notice. If such default shall not be cured within such period of thirty days, the Department of State shall revoke and cancel the certificate of authority of such foreign corporation, including any amendments thereto. * * *"

That Section 1013 does not limit or restrict the authority to revoke in Section 1010 is shown by the following:

(1) The power to revoke conferred in Section 1013 is only the power which is given to the Department of State. Nothing is said about the power of the Legislature to revoke or amend.

(2) The purpose of Section 1013 is to provide for an administrative supervision of a foreign corporation to keep it within the bounds of its certificate of authority and within the laws of this Commonwealth.

Section 1013 permits a revocation by the Department of State only in cases where the foreign corporation (1) engages in a business not authorized by its certificate, or (2) changes its name or location without first securing an amended certificate, or (3) violates a law of the Commonwealth.

These few cases, however, do not constitute an exhaustive enumeration of the causes of revocation. There is no intention shown that these causes are the sole and exclusive causes for revocation. If they were such, the Commonwealth could not revoke a certificate of authority if a corporation should cease to do business or become defunct, or be unable to pay or defaulted in paying its Pennsylvania corporation taxes. These, and numerous other grounds still exist for the revocation of a certificate of authority.

(3) Section 1013 does not, in terms or in reason, limit the reserve power of the Legislature "to alter, revoke or annul."

Nothing in the section shows any intention to deprive the Legislature of this essential power. In fact, this reserved power of the Legislature is created by the Constitution and could not be limited by the Legislature. Even without the language in Section 1010, appellant's certificate of authority is revocable.

(4) Section 1010 does not in any way refer to Section 1013, and therefore is not limited by it.

Section 1010 does not say "so long as not revoked or cancelled"—

> by the Department of State or as provided in Section 1013 for causes herein or in this Act provided.

(f) *Nothing in Section 1010 or in the Business Corporation Code generally, was intended to deprive the Legislature of its well-recognized power to place foreign and domestic corporations in classes for the purpose of taxation.*

Section 1010 does not mention taxation at all. Its language is not sufficient to confer upon foreign corporations an exemption or a more favorable return of taxation than domestic corporations enjoy.

We repeat, Section 1010 gives a foreign corporation "the same rights and privileges as a domestic corporation, but no more."

(4) *The failure to deduct from the multiplicand or capital stock value of foreign corporations certain intangible assets which are deducted from the appraised value of the capital stock of domestic corporations, does not impair the obligation of contract or deny the equal protection of the laws.*

Section 1 of the Act of June 22, 1931, P. L. 687, 72 P. S. Section 1894 (Pocket Part), provides:

> "Whenever any corporation, limited partnership, joint-stock association, or company, incorporated or formed under the laws of this Commonwealth, and liable to the payment of tax upon its capital stock, or specifically exempted therefrom under the laws of this Commonwealth, shall own, either directly, or through subsidiary or sub-subsidiary corporations, a majority of the total issued and outstanding shares of voting stock of any corporation, limited partnership, joint-stock association or company, then, in such cases, so much of the value of all shares of stock, so owned in such other corporation, limited partnership, joint-stock association, or company, as represents property or assets located or having a legal situs without this Commonwealth, shall not be liable to taxation, under the laws of this Commonwealth providing for the taxation of capital stock of corporations, limited partnerships, joint-stock associations, and companies, but shall be excluded in determining the value of the capital stock of such owning company for purposes of taxation."

This provision as to domestic corporations, however, does not violate the requirement of equality, because —

(1) It is well established by decisions of this court and of the Supreme Court of the United States that the Legislature may place foreign corporations in a different class from domestic corporations for the purpose of taxation.

(2) As the Legislature may so classify them differently, it may also impose upon foreign corporations a different tax from that imposed upon domestic corporations, provided no unreasonable discrimination results against the foreign corporations.

See *Kidd* v. *Alabama*, 188 U. S. 730 (1903).

Furthermore, the reason for granting a deduction or exemption of certain government securities and stocks of subsidiaries in taxing a domestic corporation, did not apply to a franchise tax upon foreign corporations.

The Pennsylvania Capital Stock Tax was a tax upon property and could not have been applied to the government securities. Further, only such proportion, not all, of the value of stocks of subsidiary companies as represents assets located without the Commonwealth, is deducted under the Capital Stock Tax Law.

The franchise tax, however, is not a tax upon property, and would not be imposed upon such government securities, or stocks of subsidiaries, as such, but such securities and stocks were considered only along with all other assets of the foreign corporation in determining the value of a franchise or privilege to do business in Pennsylvania. The same reasons which support the consideration of the value of tangible property outside of Pennsylvania in the formula to determine the value of the franchise, also justify the consideration of the government securities and the stocks, instead of deducting or exempting the same.

The capital stock tax is imposed upon all of the assets of a domestic corporation, including intangibles, excepting the intangibles deducted in accordance with the Act of June 22, 1931, and tangible property outside of the State. The franchise tax upon foreign corporations, however, is imposed only upon a proportion or percentage — 4.4% in the case of appellant — of the value of the total capital stock.

The average percentage resulting from the three allocating fractions amounts to .044434 (162a).

A foreign corporation unquestionably has still, in spite of the franchise tax amendment of 1935, a comparative advantage over domestic corporations in the matter of

taxation, because its tax is calculated upon 4.4% only of the capital stock value.

As stated in the decisions of this court, the burden was upon appellant to prove that a greater tax burden in fact was imposed upon a foreign corporation than upon a domestic corporation. This it has wholly failed to do.

Respectfully submitted,

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JAMES H. DUFF,
Attorney General.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 872

FORD MOTOR COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM

Now comes the appellee, the Commonwealth of Pennsylvania and moves that the appeal in the above case be dismissed on the ground that the case presents no substantial Federal question, and it further moves that, if the motion to dismiss be not granted, this court affirm the decision of the Supreme Court of Pennsylvania on the ground that the questions on which the decision of this cause depends, are so unsubstantial as not to need further argument. In support of this motion the appellee advances the reasons set forth in the statement opposing jurisdiction filed in connection with this appeal.

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JAMES H. DUFF,
Attorney General.